

No. 15385.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

DICK LEE EVANS,

Appellant.

APPELLEE'S BRIEF.

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FILED

APR 29 1957

PAUL P. O'BRIEN, CLERK



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Appellant.

APPELLEE'S BRIEF.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on April 25, 1956 under Section 462 of Title 50 Appendix, United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. 3-4]. On May 14, 1956 appellant appeared before the Honorable William C. Mathes, United States District Judge for arraignment. He entered a plea of not guilty on May 28, 1956. Trial was commenced on July 23, 1956 before the Honorable Thurmond Clarke in the United States District Court for the Southern District of California. On July 30, 1956 appellant was found guilty as charged in the Indictment. Appellant was sentenced on August 6, 1956 to the custody of the Attorney General for im-

prisonment for a period of three months. The District Court had jurisdiction of the cause of action under Section 462 of Title 50 Appendix, United States Code and Section 3231, Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statute Involved.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code. The Indictment charges a violation of Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this Title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this Title (said Sections), or rules, regulations, or directions made pursuant to this Title (said Sections) . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment”

III.

Statement of the Case.

The Indictment returned on April 25, 1956 charges that the appellant was duly registered with Local Board No. 115. He was thereafter classified 1-A and notified to report for induction into the Armed Forces of the United States on December 6, 1955 in Los Angeles County, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. 3 and 4]. On May 14, 1956 appellant was arraigned before the Honorable William C. Mathes, United States District Judge. On May 28, 1956 appellant entered a plea of not guilty before Judge Mathes and the case was set for trial. Trial was commenced on July 23, 1956 before the Honorable Thurmond Clarke without a jury. Pursuant to stipulation a photostatic copy of appellant's Selective Service was placed into evidence. On July 30, 1956 appellant was found guilty as charged in the Indictment. On August 6, 1956 appellant was sentenced to the custody of the Attorney General for imprisonment for a period of three months.

Appellant relies upon the following points in the prosecution of his appeal:

1. The trial court erred in that it misapplied the rule requiring a Selective Service registrant to exhaust his administrative remedies before he can present his defenses to a court.

2. The trial court erred in not holding that the denial of the conscientious objector status by the Selective Service system and a recommendation by the hearing officer to the Department of Justice and by the Department of Justice to the Board of Appeal for each without basis in fact, arbitrary, capricious and contrary to law.
3. The trial court erred in not holding that the report of the hearing officer, relied upon by the Department of Justice and the Board of Appeal, is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and regulations and advises the Board of Appeal to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and regulations was the only thing for the hearing officer and the Board of Appeal to follow. [Tr. 23, 24.]

IV.

Statement of the Facts.

Appellant registered under the Selective Service Act on June 27, 1951 at Local Board No. 115, Downey, California. Appellant completed and filed his Selective Service and Classification Questionnaire on November 26, 1951 [Ex. 4]. He indicated therein that he was conscientiously opposed to participation in war in any form and requested the Special Form for Conscientious Objector [Ex. 10]. The Special Form for Conscientious Objector was filed by appellant at Local Board No. 115 on December 19, 1951. Appellant there stated that he

was a member of Jehovah's Witnesses and that he had been a member of this sect since he was seven years old [Ex. 16]. On February 13, 1952 appellant was classified 1-A and was so advised by the mailing of Form 110 on February 26, 1952 [Ex. 11]. A letter appealing the classification was received from appellant by Local Board 115 on March 12, 1952 [Ex. 20]. The file was forwarded to the Appeal Board on January 23, 1953 [Ex. 11]. Appellant was retained in class 1-A by the Appeal Board on August 5, 1954 [Ex. 23]. Prior to this classification appellant's file had been forwarded by the Appeal Board to the Department of Justice for hearing and recommendation. The recommendation from the Department of Justice was received by the Appeal Board for the Southern District of California on August 2, 1954 [Ex. 29]. It was there recommended that appellant's conscientious objector claim be not sustained. Enclosed with the Department of Justice recommendation was a résumé of the investigative report [Ex. 31], which indicated generally that friends and acquaintances of appellant were not aware of the fact that appellant claimed to be a conscientious objector as he had never manifested any particularly religious inclinations. On September 14, 1954 appellant submitted additional information to Local Board 115 concerning his conscientious objector claim [Ex. 40]. Appellant there stated that he was a member of the Jehovah's Witnesses but that he "couldn't claim to be a regular member." This additional information had been requested by the Local Board on September 1,

1954 [Ex. 44]. On May 10, 1955 appellant's classification was reopened by Local Board No. 115 pursuant to* directive from the Director of Selective Service. He was on that date retained in Class 1-A and notified of said classification [Ex. 11]. By a letter dated June 1, 1955 the Local Board requested appellant to appear for an interview with the Local Board for the purpose of clarifying information in his Selective Service file [Ex. 46]. On June 14, 1955 appellant appeared before the Local Board for a personal interview. Appellant there stated that he had been a member of Jehovah's Witnesses for about eight years but that he did not attend church regularly or participate in church activities [Ex. 54]. Appellant also submitted additional written information in which he made the statement upon which appellant relies so strongly "but that doesn't change the way I believe" [Ex. 48]. After the personal interview on June 14, 1955 appellant was retained in Class 1-A by the Local Board. No appeal was taken from this classification nor had any appeal been taken by appellant since March 12, 1952 which appeal led to his classification on August 5, 1954 by the Appeal Board [Ex. 11]. On November 23, 1955 an order to report for induction on December 6, 1955 was sent to appellant [Ex. 52]. Appellant appeared at the induction station as ordered but refused to be inducted into the armed forces [Ex. 103].

*Pursuant to directive from the Director of Selective Service.

V.
ARGUMENT.

1. Appellant Is Not Entitled to Judicial Review.

A. The Law Requires Exhaustion of Administrative Remedies.

It is settled that a registrant is not entitled to a judicial review of any classification from which he did not appeal. The authorities are all to the effect that the judicial machinery may not be invoked until all administrative remedies have been unsuccessfully pursued.

Falbo v. United States, 320 U. S. 549;

Billings v. Truesdell, 321 U. S. 542;

Olinger v. Partridge (C. A., 9), 196 F. 2d 986;

Williams v. United States (C. A., 9), 203 F. 2d 85;

Rowland v. United States (C. A., 9), 207 F. 2d 621;

Kaline v. United States (C. A., 9), 235 F. 2d 54.

Appellant attempts to distinguish himself from the operation of the rule, as stated in the above cases. These asserted distinctions will be discussed below.

This Court, in a rather recent decision, had occasion to discuss the exhaustion rule thoroughly. *Mason v. United States*, 218 F. 2d 375 (1954). It was there asserted, as it is here, that the *Falbo* rule was inapplicable because *Mason* had due process of defenses and that, since such defenses raised jurisdictional questions, the rule of *Falbo* should not cut them off because of failure to ex-

haust administrative remedies. This Court rejected that argument on the basis of *United States v. Balogh*, 329 U. S. 692, and 160 F. 2d 999 (C. A., 2). In the *Balogh* case the Court of Appeals for the 2nd Circuit had reversed a conviction of the defendant for failing to report for induction into the army. The Court felt that the manner in which his ministerial claim had been handled denied Balogh a fair hearing. The Supreme Court vacated the judgment of the Circuit Court, and remanded the cause to the Circuit Court, citing the *Falbo* case. The Circuit Court, then, in the case of the *United States v. Balogh*, 160 F. 2d 999, affirmed the conviction of the District Court. The Court said, at page 1001,

“ . . . We hold that Balogh had not ‘exhausted his administrative remedies’ within the meaning of *Falbo v. United States*, (supra), and it follows that he was not entitled to raise those objections to his induction which we considered and decided in his favor upon the first appeal.”

The net result of the *Mason* and *Balogh* cases is that the Supreme Court, the Ninth Circuit, and the Second Circuit have directed that even where a registrant can show unfairness in the manner in which he was classified by his Local Board, he has no standing in Court to assert those defenses where he has failed to take an appeal within the Selective Service System. Appellant here begs the question in arguing that he was not required to take an appeal because he had been denied due process in the classification procedure. The above cited cases make it clear that such defenses cannot be presented until after exhaustion of administrative remedies by appropriate appeal.

B. Clark v. United States, 236 F. 2d 13 (C. A. 9), Does Not Obviate the Necessity of Taking a Second Appeal.

Nothing said by this Court in the *Clark* case forbids the taking of a second appeal. Appellant relies upon the following language at page 21 of the *Clark* case:

“A registrant is not entitled to repetitious determinations of identical issues.”

Appellee submits this language cannot be construed to limit the burden placed upon appellant to appeal his classification. In the *Clark* case this Court was dealing with a registrant who could not bring himself within the statutory definition of “conscientious objector.” This Court, using the above-quoted language, held simply that Clark was not entitled to a second hearing where he had already had one hearing on a prior appeal and had stated to the Local Board that he had had no change in his way of thinking since the first hearing. Nothing was said by the Court which can be construed to limit the right of a registrant to appeal from his Local Board’s classification. The *Clark* case must be considered in the light of whether or not Clark was prejudiced by the denial of the second hearing before a Department of Justice Hearing Officer. In the event Clark could have shown prejudice by a failure to grant him a second hearing, the Court very probably would have required a second hearing. This Court has made it clear, however, that the mere failure to comply with statutory directive is not, *per se*, a violation of due process. *Uffelman v. United States* (C. A. 9), 230 F. 2d 297, and *Kaline (supra)*. Appellant certainly can show no prejudice by the reopening of his classification. Such reopening started the whole appeal procedure running again, notwithstanding the *Clark* case which deals only with hearings and not with

appeals. Certainly if appellant had taken an appeal and the local board had refused to send his file on to the appeal board, he could legitimately argue that he had been denied rights set forth in the statute. How then can appellant argue that he was prejudiced by a reopening of his classification with the consequential right of appeal where the denial of the right of appeal clearly would be prejudicial? For these reasons, appellee respectfully submits that the *Clark* case cannot be relied upon by appellant for the proposition that he was not permitted a second appeal.

C. There Was a Change in Status Requiring Appellant to Take an Appeal.

Appellant argues that the appeal taken by him on March 12, 1952, [Ex. p. 20], obviates the necessity of Appellant's taking a subsequent appeal. Appellant was placed in Class 1-A by the Appeal Court for the Southern Federal Judicial District of the State of California, Panel No. 2, on August 5, 1954, [Ex. p. 23]. Prior to this classification, his case had been referred to the Department of Justice for an advisory recommendation pursuant to 50 Appendix, United States Code, Section 456(j), and 32 C. F. R. 1626.25. On March 14, 1955 the Supreme Court held, in *Gonzales v. United States*, 348 U. S. 407, that a registrant was denied a fair hearing where he did not receive a copy of the Department of Justice recommendation to the Appeal Court prior to the classification by the Appeal Board. Accordingly, on April 1, 1955, pursuant to 32 C. F. R. 1625.3(a), the Director of Selective Service promulgated a directive which provides, in pertinent part, as follows:

“Under the provisions of Section 1625.3(a) of the Selective Service Regulations, Local Boards are requested to reopen and consider anew the classifica-

tion (1) of every registrant presently in Class I-A whose case involves a claim of conscientious objection which has been finally denied by the Appeal Board or the President, . . .”

Inasmuch as Appellant's case had not been processed in the manner required by the *Gonzales* case, his classification was re-opened and on May 10, 1955 he was classified I-A [Ex. p. 11]. Appellee concedes that had Appellant been ordered for induction on the basis of the Appeal Board classification of August 5, 1954, there would have been a denial of a fair hearing as prescribed by the *Gonzales* case. Under these circumstances, the Local Board had no alternative but to re-open the classification of Appellant, and allow him an opportunity to take another appeal. If the argument of Appellant is accepted, that the Local Board could not re-classify appellant in the same class, then appellant would have been totally immune from ever being ordered to report for induction. Such a construction of the law would mean that once an error had been made in classification procedure the local board would have no power to correct the error even though the error was made prior to the sending of the order to report for induction and precluded the local board's power to validly order a registrant for induction. It will be noted, however, that the classification out of which the prosecution arose was a classification of June 14, 1955. Prior to this classification, registrant had a personal hearing before the local board and submitted additional written evidence of his claim. [Ex. pp. 48-51, 54.] It will be noted that this additional information was supplied to the local board well after the time the appeal board classified appellant 1-A on August 5, 1954. Hence, there was some new and intervening evidence on which the board could act.

**D. The Law Does Not Support Appellant's Argument
That an Appeal Was Not Required.**

It has already been pointed out above that the case of *Clark v. United States, supra*, does not excuse appellant's failure to appeal his classification. Appellant argues, however, that there are recognized exceptions in the field of administrative law to the doctrine of exhaustion of administrative remedies. Appellant has cited no authority for this proposition in the field of Selective Service law. There is no authority calling for a departure from the "long settled rule of judicial administration that no one is entitled to judicial relief for his supposed or threatened injury until a prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The only departure from the rule in the *Myers* case are in cases like *Levers v. Anderson*, 326 U. S. 219, where the Court held that the petitioner does not have to file a petition for a rehearing where one hearing had already been granted and the granting of the rehearing was purely discretionary with the agency. In the case of *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, it was held that an order by the Interstate Commerce Commission clearly exceeded its statutory powers. Hence, the Court would maintain jurisdiction notwithstanding the fact that no attempt was made to obtain redress from the Interstate Commerce Commission itself. Cases of this kind cited by appellant are clearly distinguishable for there is no question here that the board had jurisdiction to classify and order appellant for induction. It is clear in the statute, 50 App. U. S. C. 450 *et seq.*, and in the regulations, 32 C. F. R. 1622.1(c), that it is the local board's responsibility to decide, subject to the right of appeal,

the class in which each registrant shall be placed and to order him for induction. Hence, the claim made here that the local board exceeded its jurisdiction in ordering appellant for induction and that this fact relieves appellant of the duty of appealing his classification has no basis in fact or in law.

2. There Was Basis in Fact for Appellant's Classification and the Standards Used by the Local Board in Classifying Appellant Were Authorized by Law.

Appellant's second and third points will be discussed together herein for they necessarily overlap. Appellant concedes that his "threshold point" is controlling here and in the event the Court rules against him on that point the Court cannot look further to determine if there was basis in fact for appellant's classification. 32 C. F. R. 1622.1(c) states as follows:

"It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of the classification questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within a time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class 1-A."

It is apparent from the foregoing regulation that the burden was on appellant to establish his exemption from military service. *Gaston v. United States* (C. A. 4, 1955), 222 F. 2d 818. The case of *Witmer v. United States*, 348 U. S. 375 is controlling as to whether or not appellant satisfied this burden and as to whether or not there was basis in fact for the classification arrived at by the local board. In that case the Supreme Court affirmed the conviction of a registrant who had failed to submit to induction after his claim as a conscientious objector had been denied by the local board. The Court said at page 381:

“Petitioner argues from this that there was no specific evidence herein compatible with his claimed conscientious objector status. But in *Dickinson* (346 U. S. 389) the registrant made out his prima facie case by means of objective facts—he was ‘a regular or duly ordained minister in religion.’ Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which cast doubt on the veracity of the registrant is relevant . . . in short, the nature of a registrant’s prima facie case determines the type of evidence needed to rebut his claim.”

It is clear from this language that in order to determine the subjective state of mind of a registrant, the

local board must look to his objective acts. Appellant filed his special form for conscientious objector on December 19, 1951, with the local board. [Ex. 13.] In it, he stated he had been affiliated with Jehovah's Witnesses as a minister ever since he was seven years old. [Ex. 16.] On June 14, 1955, in a written form submitted to the local board he stated that he was not a member of a church, religious organization or sect. [Ex. 48.] He also stated, "I haven't been active in the preaching work or attending the bible studies regular, but that doesn't change the way I believe." It was further stated [Ex. 49], ". . . every chance I have I tell whoever I am talking to on the subject of the bible what I believe is the correct meaning and if I had a bible we look through it and see if I can clear up what we are discussing." These statements of appellants must be compared with the statements made by acquaintances which are contained in the investigative résumé. [Exs. 31-33.] It is readily apparent from the investigative résumé that appellant had manifested his conscientious scruples to no one. All fellow employees interviewed stated that they had no idea that appellant claimed to be a conscientious objector and that he had never indicated to any of them that he had any objection to military service.

It will also be noted that the members of the local board had an opportunity to evaluate the sincerity of appellant at his personal appearance before the local board on June 14, 1955. [Ex. 54.] Appellant there reiterated his claim as a conscientious objector; however, he again could indicate no objective acts on his part which would show his subjective state of mind in claiming to be a conscientious objector. Appellant indicated there among

other things that he was a plumber and a truck driver, that he had taken part in all school sports, that he owned a rifle and did some deer hunting. Appellee concedes that these statements of appellant's activities taken individually are of little significance. However, when weighed with the material contained in the investigative résumé [Ex. 31] and with the impression the appellant made on the hearing officer [Ex. 30], appellee respectfully submits that there were more than sufficient objective acts, or lack of them, that provide "basis in fact" for the classification of 1-A arrived at by the local board.

Appellee does not intend to discuss at length the scope of review of Selective Service Orders in the Courts. It has long been settled "that the Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. Decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Estep v. United States*, 327 U. S. 114.

Appellee respectfully submits that the evidence presented to the Trial Court clearly indicated that there was basis in fact for the local board's classification. Hence, the District Court was not called upon to look further into the classification of appellant. Appellee further submits that the standards used by the local board in determining appellant's classification were relevant and material as prescribed by the *Witmer* case, *supra*.

Conclusion.

1. The District Court did not err in denying appellant's motion for judgment of acquittal.

2. The District Court did not err in finding the defendant guilty; the evidence supports the judgment, and appellant's conviction should be affirmed.

Respectfully submitted,

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